United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-1215

B

P/S

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-against-

ANGELO TRABACCHI,

Appellant.

On Appeal From The United States District Court
For The Eastern District of New York

Appellant's Brief

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SECOND CIRCUIT

UNITED STATES OF AMERICA, 75-1215

- against -

ANGELO TRABACCHI,

Appellant

STATEMENT

This is an appeal from a judgment of conviction made and entered the 23rd day of May 1973. Honorable Milton Pollack sentenced appellant to a term of imprisonment of eight (8) years upon his conviction for a conspiracy to violate the narcotics laws of the United States, Title 21 U.S.C. Section 173 and 174 (old law) and Sections 812, 841 (a) (1) and 841 (b)(1)(A) of Title 21 of the U.S.C. (new law).

The issues presented to this Court are:

1. Does retrial of the premature dismissal of the jury after five hours of deliberation in appellant's first trial constitute double jeopardy?

2. Did the delay from the date the events charged in the indictment were claimed to give rise to the conspiracy charge until appellant's indictment prejudice appellant's defense where the death of an essential witness occurred during that period?

3. Was appellant deprived of a fair trial by the conduct of the prosecution during the entire prosecution of appellant encompassing three trials where the prosecutor withheld certain tapes and statements of witnesses which were necessary to a proper defense and by the prosecution's improper remarks at the third and final trial?

THE FACTS:

PRIOR PROCEEDINGS:

An application was submitted to Honorable Lloyd McMahon, the trial judge at the first trial to dismiss indictment number 73 CR 970 (superseded by the indictment in question herein 75 CR 262) on the ground that the delay from the date of the claimed occurrences of the events charged which were alleged to have occurred in 1971 until the indictment in 1973 adversely affected appellant's ability to defend himself against the accusations set forth in the indictment (114-117A)*. The application was denied without a hearing (70A-71A). Appellant and a co-defendant proceeded to trial on the five count indictment. After approximately 3-1/2 days of testimony from November 12, 1973 through November 15, 1973, the case was given to the jury at 12:47 P.M. on November 18, 1973. A verdict of guilty was returned as to the co-defendantMaher at approximately 4:40 P.M.

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*(A) refers to the pages in the appendix.

However, the jury had not yet decided on the verdict as to appellant. The Court declared a mistrial and dismissed the jury (63-67A, 72A). A second trial was held before Honorable Charles Metzner. Appellant renewed the application for dismissal of the indictment because of undue delay in the prosecution of the charges encompassed in the predecessor indictment, avering that during the delay appellant had been denied of a essential witness, Anthony Santana, an employee who would testify to the falsity of the testimony of the government witnesses, (73-75A) Appellant's application was denied without a hearing and the matter proceeded to trial. Again the jury was unable to agree upon a verdict. The government superseded indictment number 73 CR 970 with indictment number 75 CR 262 adding a co-defendant Ronald Ricchio (acquitted). Prior to the trial appellant renewed his application for a dismissal of the indictment. This application was predicated on appellant's claim that the undue delay of the government in charging him of the crimes contained in the indictment had deprived him of a defense through the loss of the death of an essential witness; and the retrial of the crimes charged in the present indictment would constitute double jeopardy due to Judge McMahon's precipitous discharge of the jury in the first trial. (This application was not transcribed as part of the record on appeal. However, counsel renewed this motion at the close of the government's case (15, 16A)).

THE TRIAL

According to Albert Rossi, self-confessed extorter, robber bunco artist, narcotics dealer, loan shark, attempted murderer, an unrepentent violator of the law, he entered the narcotics business as partner to appellant sometime in 1970 and without any prior experience, began dealing in kilos of heroin. That by merely"bugging"appellant Rossi was able to convince appellant of his usefulness in supplying narcotics for appellant to distribute. Mr. Rossi was immediately introduced to appellant's larger customers Fred Wofeld and Charles Brooks. In the first transaction of the new partnership Rossi was entrusted with $11,000 to buy a kilogram of heroin for Wofeld. Rossi took the $11,000 to his supplier, Red Davico, whom he also "bugged" to get into the narcotics business. Davico informed Rossi that $11,000 could only purchase a half a kilo. Rossi could not contact Wofeld and took the money home with him and had his father place the money in a safe at his home. The next morning Rossi was awakened by a telephone call from appellant. Rossi told appellant of the events of the preceeding evening. Appellant requested Rossi remain at home to await his arrival. When appellant arrived Rossi gave him the $11,000 and appellant departed (16-39)**.

**( )refers to pages of the transcribed minutes of the third trial, indictment number 75 CR 262.

After the aborted purchase, Rossi met appellant and Wofeld at Manhattan Beer Distributor, a beer distributing business managed by appellant located on First Avenue between 115th and 116th Streets in Manhattan. Wofeld told Rossi that he only needed 1/8 or 1/4 kilo of heroin. Rossi responded that he could only supply 1/2 kilos and requested Wofeld get five persons together to make up sufficient buying power for the purchase. Rossi informed Wofeld of the need for money to purchase narcotics (39, 40).

Wofeld met Rossi at Charles Brooks' liquor store. Only Rossi, Brooks and Wofeld were present, Rossi representing the partnership. $16,100 was handed over to Rossi for the purchase of narcotics. Rossi counted the money and immediately stole $1,100. The remaining $15,000 was offered to Red Davico for a kilo of heroin. However Davico was awaiting a fresh supply of narcotics and declined the transaction. Rossi thereupon went shopping for drugs in East Harlem. After ejecting a prospective purchase which according to Rossi was inferior quality, Rossi consummated a purchase with the "Wolf Pack". The narcotics were delivered to Wofeld's home and the balance due of $4,000 was to be paid the next day (40-57).

On the following day Rossi received a telephone call from appellant concerning a problem with the quality of the narcotics given to Wofeld. Rossi immediately hastened to Manhattan Beer Distributors and was told by Wofeld that the narcotics were no good. On tasting the powder Rossi was satisfied that heroin was present and for substantiation he took some powder and a $1.00 bill to a junkie . The "junkie" tested it in his veins and informed Rossi that the narcotics could only be cut 2-1, (55-58).

A three hour meeting between appellant, Rossi and the "Wolf Pack" settled nothing. Wofeld, Rossi and appellant agreed that a refund of $10,000 was in order and appellant would obtain the money from a"shylock" (58-61).

Appellant's $10,000 loss in this transaction was the reason Rossi advanced for making a mere couple of thousand dollars on a 2 kilo, $50,000 narcotics transaction between himself and appellant. However, Mr. Rossi had no compunction to deal outside of the partnership with appellant's customers without informing appellant (61-66).

The Rossi, Trabacchi partnership folded with the two kilo, $50,000 transaction and appellant continued in business alone with Messrs. Andrew DePasquale and Raymond Antonelli as suppliers as per the testimony of these government witnesses. (They testified at the second and third trials. Rossi testified only at the last trial). Mr. DePasquale testified that in the summer of 1970 he met Raymond Antonelli whom he then

worked for as a delivery boy of narcotics, in front of the Delightful Coffee Shop. Antonelli asked DePasquale to take a walk and they both walked to Manhattan Beer Distributor where Antonelli handed appellant a package and appellant handed Antonelli another package containing money. On a second trip to Manhattan two weeks later, appellant asked Antonelli for the same thing as before. DePasquale and Antonelli left and went to an apartment where narcotics were stashed and delivered an 1/8th of a kilo to appellant the same day (195-204).

According to Antonelli's version, the narcotics were delivered the next day. And DePasquale accompanied him to Manhattan on the first occasion and was present when he agreed with appellant to deliver four ounces the next day. Antonelli also testified to a purchase of heroin from appellant where he followed appellant who drove a green Oldsmobile to New Jersey to pick up an 1/8th of a kilogram of heroin. That appellant had a green Oldsmobile registered to him on October 31, 1970 was attested to by a representative of the New Jersey Department of Motor Vehicles (237-253, 343, 344).

A final transaction from which appellant still owed Antonelli $700 or $800 was testified to by Antonelli. DePasquale was unable to recall this transaction although according to Antonelli's version he was present in Manhattan Beer Distributors when this transaction took place. However, despite appellant having "beaten" Antonelli for $700 or $800 Antonelli never mentioned appellant's name or Manhattan Beer Distributors to the authorities from when he was arrested in 1972. Likewise

DePasquale who was cooperating with the authorities from his arrest in July 1972 could not recall appellant or Manhattan Beer Distributors. Both witnesses gave elaborate statements to the authorities outlining in minute detail their narcotics dealings to the prosecutors both state and federal and appellant or Manhattan was never mentioned. A tape recording was made of a statement both witnesses gave to a state prosecutor, which appellant requested and was refused (220-223, 253, 256, 301-305, 11-15A, 80-118A).

A final witness as to appellant's narcotics activities, Doris Olivero (who testified at all three trials) related seeing appellant outside Manhattan Beer Distributors on five or six occasions. According to her testimony she would accompany her husband Sam Olivero to Manhattan and he would always return to their automobile with a case of beer in which narcotics were hidden. However, at the first trial, Mrs. Olivero was unable to identify appellant from a photo shown to her by the prosecution and told an agent of the government that the person Sam Olivero dealt with was Anthony Salerno (354-366, 374-376, 390, 391).

Doris Olivero related a meeting between appellant, Sam Olivero, Bobby Maher (the co-defendant at the first trial) at Dan's Bar and Grill in the Bronx where appellant congratulated her on the birth of a girl and expressed disappointment in not having known of the event so that he could have sent flowers (367, 368, 373, 374).

Detective Ruben Bankhead confirmed the existence of a Dan's Bar and Grill. He was, however, unable to identify appellant,Doris Olivero or Sam Olivero although he had been following Maher for approximately one month (393-400).

Detective Twohill also testified to the results of surveillance. The surveillance this time was of Manhattan Beer Distributors where he testified he observed Fred Wofeld and Charles Brooks enter on different occasions, (403-410).

The government presented Detective Botte who took a statement from the co-defendant Ronald Riccio and Mr. and Mrs. Riccio testified that Ronald Riccio was in a narcotics rehabilitation program from July 7, 1970. Records of the Supreme Court, New York County confirming Ronald Riccio's presence in the program from July 21, 1970 were also presented to the jury, (345-349, 420-447).

POINT I:

DISMISSAL OF THE JURY WITHOUT THE CONSENT OF APPELLANT AFTER A MERE FIVE HOURS OF DELIBERATION FORECLOSED A RETRIAL AND VIOLATED THE 5TH AMENDMENT PROHIBITION AGAINST BEING HELD TWICE IN JEOPARDY.

Aborting a trial before it is "manifestly necessary" is an abuse of discretion. A defendant has a right to have his fate determined by a jury first empanelled unless "there is a manifest necessity for the act" of dismissing of the jury. U.S. v. Perez, 22 U.S. 759, 580; Illinois v. Sommerville, 410 U.S. 458, 471.

A trial judge does not have the constitutional mandate to dismiss a jury when he believes the jury is fatigued where such fatigue is not supported by the record. U.S. Ex Rel. Russo v. New Jersey, 483 F. 2d 7. Similarly dismissal of a jury

> "...without considering any other factors, simply considered that approximately 11 hours of deliberation, in a case presenting a close question of credibility was long enough... failed to protect adequately the defendant's right to have his case decided by a particular tribunal". (U.S. v. Lansdown, 460 F. 2d 164, 169).

In the instant case the Court concluded:

> "You have had the case for five hours and you have been unable to reach agreement; so I will declare a mistrial". (72A)

Nowhere in the record does it appear that the jury was "deadlocked". United States v. Beckerman, (2nd Cir. Docket No. 742178). U.S. v. See 505 F. 2d 845.

The foreman of the jury merely stated:

> "We have not been able to reach a verdict"

in response to the Court's question:

> "Have you been able to reach a verdict on count 1 and counts 2 and 3?" (72A)

It does not appear that counsel in any way consented to or requested the dismissal of the jury and the declaration of a mistrial. U.S. v. Goldstein, 479 F. 2d 1061. On the record

before the Court, there was not the slightest hint that a verdict could not be arrived at by the jury if allotted a reasonable amount of time. The dismissal of the jury without scrutinizing the exercise of such discretion with "sharp surveillance" is an abuse of discretion. U.S. v. Gori, 367 U.S. 365; U.S. v. Beckerman, supra; see also Webb v. Court of Common Pleas, 3rd Circuit, decided 5/13/75, 17 Cr. L. 2209 where the Court of Appeals for the Third Circuit barred a retrial on facts similar to the present case. However, in that case counsel stated his objection to the mistrial on the record. It does not appear from the record in the instant case that counsel had an opportunity to express his objection to the dismissal of the jury. Therefore the Court's hasty dismissal of the jury without seeking alternatives from the counsel and the jury early in the afternoon when sufficient time to deliberate without any inconvenience on either counsel or the jury is an abuse of discretion.

POINT II:

A DELAY IN PROSECUTING APPELLANT RESULTED IN LOSS OF A WITNESS DEPRIVING THE APPELLANT OF THE ABILITY TO PROPERLY DEFEND HIMSELF AGAINST THE ACCUSATION EVENTUALLY LODGED BY THE GOVERNMENT.

Appellant was indicted in 1973 for acts alleged to constitute violations of the narcotics laws of the United States which were purported to have occurred in 1969 and 1970.

During this delay a former employee of appellant, Anthony Santana, died of a heart attack. It is appellant's contention that had the government proceeded in a timely fashion, Mr. Santana would have been available to testify at the first trial of the appellant's three trials on the facts stated in two indictments. Mr. Santana's testimony would have contradicted Olivero's testimony that she and her husband were at Manhattan Beer Distributors and that Sam Olivero on six occasions left Manhattan Beer Distributors with a case of beer. Mr. Santana, according to appellant, would have testified that he was employed by Manhattan Beer Distributors and that Mr. and Mrs. Olivero were never at Manhattan to the best of his knowledge.

"A plausible claim of prejudice resulting from the delay in arrest" by reason of a loss of "key defense witnesses has been advanced". U.S. v. Feinberg, 383 F. 2d, 60, 66. It was error therefore to shunt aside appellant's application to dismiss the indictment without a determination of the legitimacy of appellant's claim for prejudice or the reason for the government's delay. See Ross v. U.S., 242 F. 2d, 210; Nickins v. U.S., 323 F. 2d 808; Godfrey v.U.S., 358 F. 2d 850; Woodey V. U.S., 370 F. 2d 214; U.S. v. Nepue, 401 F. 2d 107; Jones v. U.S., 402 F. 2d 639.

"There was nothing in the original record indicating the reason for what appeared to us to be a long delay. Because we viewed the Fifth Amendment claim as one involving a process of balancing the reasonableness of the delay against any resultant prejudice to the defendant we remand it to the District Court for finding with respect to the reason for delay." (U.S. v. Jackson, 504 F. 2d 337, 339).

POINT III:

IMPROPRIETIES IN SECURING THE EVENTUAL CONVICTION OF APPELLANT THROUGHOUT THE GOVERNMENT'S PROSECUTION OF APPELLANT, DEPRIVED APPELLANT OF A FAIR TRIAL.

Withholding a tape recording of government witnesses Andrew DePasquale and Raymond Antonelli taken by the New York State narcotics prosecutor and not permitting appellant to listen to the tape which appellant claims implicates scores of persons in or around the New York area and more particularly East Harlem, but makes no mention of appellant or the business he managed, violated appellant's right to a fair trial. Jencks v. U.S., 353 U.S. 657; Brady v. Maryland, 373 U.S. 83. Likewise the government's withholding of certain statements obtained from their witnesses by the District Attorney of the special narcotics prosecutors office and agents of the United States government which described in detail month by month and in their own handwriting, narcotics activities of these witnesses without mentioning defendant of his business, Manhattan Beer Distributors, at the second trial of the appellant which trial resulted in a hung jury, deprived appellant of a fair trial. Both the tapes

and the statements "relate generally to the events and activities testified to". U.S. v. Pacelli, 491 F. 2d 1108, 1118.

A specific request was made for the tape recordings mentioned above at the second and third trial of appellant. And it is believed that such evidence would be of greater value, "than which is merely favorable to the accused." U.S. v. Pfingst, 490 F. 2d 262, 277.

In addition the prosecutor's remarks during the present trial both in his opening statement to the jury and summation were improper. Particular emphasis was placed on the importance of this matter to the government; referring not that justice be done but to obtaining appellant's conviction. (18A). On summation the prosecutor continued this tactic by aligning the jury in the side of the government in executing the laws of the United States which;

> "...are not self-executing. That is why your job in this courtroom is very important. In a very real sense, although the federal laws are enacted by the Congress, they are never enforced until a court of law and a jury like yourselves see to it that they are enforced. And as jurors in this case that is your responsibility." (23A)*.

Other remarks alluding to the trial as a day in the life of appellant and referring to appellant as a "junk dealer" having other dealings in Manhattan were clearly improper. (20-22A).

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* See Judge Pollacks charge concerning the reason for conspiracy laws (44, 45A).

N. S. V. Trabocchi - Rosenthal

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 24 day of July, 1975 deponent served the within Brief upon N.S. Attorneys

attorneye(s) for appellee

in this action, at 225 Cadman Plaza East.
Brooklyn, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
24 day of July, 1975.
William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976